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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 MICHAEL AMES,

7 Plaintiff,

8 v.

9 MARK LINDQUIST, et al.,

10 Defendants.

CASE NO. C16-5090BHS

ORDER DENYING
PLAINTIFF'S MOTION FOR
RECONSIDERATION,
GRANTING IN PART
DEFENDANTS' MOTION TO
DISMISS, GRANTING
PLAINTIFF LEAVE TO
AMEND, REQUESTING
ADDITIONAL BRIEFING,
AND RENOTING MOTION

13 This matter comes before the Court on Defendants Mark Lindquist, Chelsea
14 Lindquist, and Pierce County's ("Defendants") motion to dismiss (Dkt. 26) and Plaintiff
15 Michael Ames's ("Ames") motion for reconsideration (Dkt. 37). The Court has
16 considered the pleadings filed in support of and in opposition to the motion and the
17 remainder of the file and hereby rules as follows:

18 **I. PROCEDURAL HISTORY**

19 On February 2, 2016, Ames filed a complaint against Defendants in Pierce County
20 Superior Court for the State of Washington. Dkt. 1, Exh. 1. Ames asserted causes of
21 action for violations of his constitutional rights, conspiracy to violate his civil rights,
22 abuse of process, invasion of privacy, constructive discharge, outrage, and

1 indemnification. *Id.* On February 22, 2016, Defendants filed a motion to dismiss. Dkt.
2 13. On April 21, 2016, the Court granted the motion concluding that Ames failed to
3 connect factual allegations to the elements of his causes of action and granted Ames leave
4 to amend. Dkt. 21.

5 On May 5, 2016, Ames filed a First Amended Complaint (“FAC”) asserting six
6 causes of action: (1) violations of his civil rights, including his First Amendment right to
7 freedom of speech, right to redress or petition, and right to access the courts and his
8 Fourteenth Amendment rights to procedural and substantive due process, (2) abuse of
9 process, (3) invasion of privacy, (4) constructive discharge/breach of contract, (5)
10 outrage, and (6) indemnification. Dkt. 24. The FAC is 72 pages long, and Ames
11 attached 320 pages of appendices. *Id.*

12 On May 19, 2016, Defendants filed a motion to dismiss. Dkt. 26. On October 6,
13 2016, the Court granted the motion in part, reserved ruling in part, and requested
14 additional briefing. Dkt. 35. On October 18, 2016, Ames filed a supplemental brief.
15 Dkt. 36. On October 19, 2016, Ames filed a motion for reconsideration. Dkt. 37. On
16 October 28, 2016, Defendants filed a supplemental reply. Dkt. 38. On December 27,
17 2016, Defendants filed a request for judicial notice. Dkt. 39.

18 II. DISCUSSION

19 A. Motion for Reconsideration

20 Motions for reconsideration are governed by Local Rule 7(h), which provides:

21 Motions for reconsideration are disfavored. The court will ordinarily
22 deny such motions in the absence of a showing of manifest error in the

1 prior ruling or a showing of new facts or legal authority which could not
2 have been brought to its attention earlier with reasonable diligence.

3 Local Rules, W.D. Wash. LCR 7(h).

4 In this case, it is unclear whether Ames moves for reconsideration on the basis of
5 new facts and/or authority or a manifest error of law. Regarding the former, Ames
6 correctly concludes that his “claims against Pierce County that were not dismissed would
7 include entity liability based upon the acts and omissions of Lindquist as a government
8 official.” Dkt. 37 at 3. Accordingly, Lindquist as a witness or integral actor for the
9 alleged deprivations is fundamentally different than Lindquist as a party. The Court
10 concludes that Ames has failed to show a manifest error of law on this issue.

11 Regarding new facts or authority, the motion highlights some of the problems with
12 Ames’s shotgun-style approach to stating his claims. For example, Ames cites, for the
13 first time, *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1072 (2012), for the
14 proposition that a “subordinate officer who is not the final decision maker can still be
15 liable under § 1983 if he set[s] in motion a series of acts by others which the actor knows
16 or reasonably should know would cause others to inflict the constitutional injury.” Dkt.
17 37 at 3–4. The Court agrees with Ames that this is valid precedent. Ames, however, fails
18 to correlate precedent with factual allegations in his complaint. The two relevant
19 paragraphs in his complaint provide as follows:

20 Defendant Mark Lindquist directed his subordinates in the acts and
21 failures to act that deprived Mike Ames of his First Amendment and
22 Fourteenth Amendment (Due Process) rights.

Defendant Mark Lindquist set in motion a series of acts by his
subordinates that he knew or reasonably should have known would cause

1 his subordinates to deprive Mike Ames of his First Amendment and
2 Fourteenth Amendment (Due Process) rights.

3 Dkt. 24 ¶¶ 6.17, 6.18. These allegations do not state a claim under *Karl* because, if the
4 lead prosecutor is not an “employer” for purposes of First Amendment liability,
5 subordinate prosecutors would definitely not be considered Ames’s employers either.
6 Therefore, even under Ames’s new authority, his complaint still fails to state a claim.

7 Finally, Ames argues that he is prejudiced by “having to argue his case on a [Rule]
8 12(b)(6) motion, divulging all his theories, before he has the opportunity to fully develop
9 them” Dkt. 37 at 6. Contrary to Ames’s assertion, the rules of procedure require
10 Ames to provide “a short and plain statement of the claim showing that the pleader is
11 entitled to relief” Fed. R. Civ. P. 8(a)(2). If Ames fails to do so, then there is no
12 need for discovery. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)
13 (Plaintiffs must allege “enough facts to state a claim to relief that is plausible on its
14 face.”). Accordingly, the Court denies Ames’s motion for reconsideration.

15 **B. Motion to Dismiss**

16 Ames alleges violations of his procedural and substantive due process rights. FAC
17 ¶¶ 6.69–6.81. Defendants move to dismiss these claims because Ames has failed to state
18 a claim, the claims are barred by the statute of limitations, and Defendants are entitled to
19 immunity. Dkt. 38.

20 **1. Standard**

21 Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil
22 Procedure may be based on either the lack of a cognizable legal theory or the absence of

1 sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Department*,
2 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the
3 complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301
4 (9th Cir. 1983). To survive a motion to dismiss, the complaint does not require detailed
5 factual allegations but must provide the grounds for entitlement to relief and not merely a
6 "formulaic recitation" of the elements of a cause of action. *Twombly*, 127 S. Ct. at 1965.
7 Plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face."
8 *Id.* at 1974.

9 **2. Claims**

10 In this case, Ames's failure to clearly set forth factual allegations in support of his
11 claims is not only fatal in and of itself, but also precludes consideration of statute of
12 limitations issues and relevant immunities.

13 **a. Statute of Limitations**

14 Defendants argue that Ames's due process claim *may* be barred by the statute of
15 limitations. It is undisputed that Ames has alleged facts that occurred before the
16 applicable statute of limitations. The problem, however, is that the complaint and
17 Ames's opposition are filled with unnecessary and irrelevant allegations of fact that make
18 it extremely difficult to determine which allegations actually form the basis of a claim
19 and whether the claim is time barred. Asserting every possible allegation of fact in an
20 unorganized manner is one method of litigating, but it does not lead to the orderly and
21 efficient administration of justice. Thus, the Court agrees with Defendants that Ames's
22 claim *may* be time-barred. If and when the relevant allegations are identified, Defendants

1 and the Court will be in a better position to assess the timeliness of the claims.

2 Otherwise, there exists only a potential for dismissal on this issue.

3 **b. Procedural Due Process**

4 Ames alleges that Defendants violated his procedural due process rights. Comp.

5 ¶¶ 6.69–.73. Generally, “[w]here a person’s good name, reputation, honor, or integrity is
6 at stake because of what the government is doing to him, notice and an opportunity to be
7 heard are essential.” *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). The
8 Supreme Court has:

9 [r]ecognized the serious damage that could be inflicted by branding a
10 government employee as ‘disloyal,’ and thereby stigmatizing his good
11 name. But the Court has never held that the mere defamation of an
12 individual, whether by branding him disloyal or otherwise, was sufficient to
13 invoke the guarantees of due process absent an accompanying loss of
14 government employment.
15 *Paul v. Davis*, 424 U.S. 693, 706 (1976) (footnote omitted). To prove his claim, Ames
16 “must show that ‘(1) the accuracy of the charge is contested; (2) there is some public
17 disclosure of the charge; and (3) the charge is made in connection with termination of
18 employment.’” *Mustafa v. Clark Cnty. Sch. Dist.*, 157 F.3d 1169, 1179 (9th Cir. 1998)
19 (citing *Matthews v. Harney Cnty.*, 819 F.2d 889, 89192 (9th Cir. 1987)). “If a liberty
20 interest is thereby implicated, the employee must be given an opportunity to refute the
21 stigmatizing charge.” *Id.* (citing *Codd v. Velger*, 429 U.S. 624, 627 (1977)).

22 In this case, Ames asserts five paragraphs of allegations in support of his
procedural due process claim. FAC ¶¶ 6.69–.73. First, Ames alleges that:

Defendants have denied Mike Ames any administrative remedies
and have failed to take action. Defendants refused to investigate his

1 whistleblower retaliation complaint that he filed when he received the
2 prosecutor's 2014 "PIE" correspondence on the grounds that he was
3 already retired, yet defendants continued their retaliation after they
4 constructively discharged him.

5 *Id.* ¶ 6.69. The alleged failure to provide administrative remedies and failure to "take
6 action" are too conclusory to establish any element of a procedural due process claim.
7 Moreover, Ames fails to explain how a failure to investigate his whistleblower complaint
8 establishes any element of a due process claim. In fact, he fails to cite any authority to
9 support the proposition that a failure to investigate violates due process, which is founded
10 on the notion of "notice and an opportunity to be heard" *Wisconsin*, 400 U.S. at
11 437. Similarly, retaliation has nothing to do with procedural due process. Therefore, this
12 paragraph fails to allege any fact establishing any element of a due process claim.

13 Second, Ames alleges that "Defendants have denied him a name clearing hearing."
14 FAC ¶ 6.70. Ames, however, is only entitled to a hearing if he establishes the elements
15 of his claim. *Mustafa*, 157 F.3d at 1179. Thus, this allegation refers more to the remedy
16 for the public disclosure of stigmatizing material rather than the violation itself.

17 Third, Ames includes a paragraph referencing procedural protections for
18 whistleblowers and advanced notice of public filings. Specifically, he alleges as follows:

19 Defendants have denied Mike Ames the procedural protections
20 associated with whistleblower reports. Det. Ames was not advised that an
21 unfounded whistleblower complaint would be used as "Brady" material.
22 Det. Ames was not advised nor notified that the prosecutor's office was
preparing declarations to discredit him using his statement to [Jeffrey]
Coopersmith, and he had no opportunity to challenge the declarations prior
to filing.

1 FAC ¶ 6.71. Ames fails to cite any authority for the proposition that he has a
2 constitutional due process right to prior notice of a publically stigmatizing report or court
3 filing. Thus, allegations of the failure to give notice of either the whistleblower
4 complaint or the declaration do not establish any element of a due process claim.

5 Fourth, Ames alleges that Defendants' actions impeded the efficient and orderly
6 administration of criminal matters. Ames alleges as follows:

7 Defendants violated the underlying policy objectives behind "Brady"
8 disclosures by manufacturing false "Brady" materials, which disrupt and
9 interfere with the rights of criminal defendants and further disrupt the
10 proceedings in criminal cases like the *George* case. The proceedings are
11 disrupted and delayed addressing potential impeachment evidence that is
12 not credible. Lindquist attempted to impeach Ames though [sic] judicial
13 edict in criminal matters to discredit his testimony in *Dalsing* that
14 implicated the prosecutor's office.

15 *Id.* ¶ 6.72. Ames has failed to show that the disruption of independent criminal matters
16 establishes a violation of his procedural due process rights. Thus, these allegations are
17 unnecessary and irrelevant.

18 Fifth, Ames alleges that Defendants failed to follow their own internal protocols.
19 Specifically, Ames alleges as follows:

20 Defendants put Det. Ames under investigation outside the protocols
21 and procedures prescribed in the department's Lexipol Policy 1020 and
22 other prior policies, procedures and memorandums that afford due process
protections like notice and an opportunity to be heard.

23 *Id.* ¶ 6.73. Ames, however, fails to show that any violation of a municipal policy
24 establishes a constitutional due process violation. Therefore, based on the allegations in
25 the complaint, Ames has failed to provide sufficient factual allegations showing any

1 entitlement to relief, *Twombly*, 127 S. Ct. at 1965, and the Court grants Defendants’
2 motion to dismiss Ames’s procedural due process claim.

3 In the event the court finds that dismissal is warranted, the court should grant the
4 plaintiff leave to amend unless amendment would be futile. *Eminence Capital, LLC v.*
5 *Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). In Ames’s supplemental brief, he
6 provides additional allegations in support of his claim that Defendants publically
7 disclosed stigmatizing statements. Dkt. 36 at 4–6. Ames cites a declaration by deputy
8 civil prosecutor James Richmond declaring that Ames made false statements under oath.
9 *Id.* at 4–5 (citing Dkt. 29-1 at 3). The Court is cognizant of the difficulties Ames faces
10 linking this statement to the named defendants and overcoming immunities, but, at this
11 point, it is at least conceivable that such an allegation could form the basis of a claim.
12 Therefore, the Court grants Ames leave to amend this claim.

13 The Court also notes that the remainder of the allegations in Ames’s brief appear
14 to have been publically disclosed after Ames left the police force. For example, Ames
15 stated that he would retire from the sheriff’s office on March 21, 2014, Dkt. 24-1 at 3, but
16 alleges that declarations filed in May of 2014 support his procedural due process claim,
17 Dkt. 36 at 5 (citing 24-1 at 211–219). Ames fails to explain how conduct subsequent to
18 his constructive discharge or forced quit is connected to the prior loss of government
19 employment. *See Paul*, 424 U.S. at 706 (“the Court has never held that the mere
20 defamation of an individual, whether by branding him disloyal or otherwise, was
21 sufficient to invoke the guarantees of due process absent an accompanying loss of
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1 government employment.”). In other words, alleged defamation post deprivation of
2 employment does not appear to implicate constitutional protections.

3 **c. Substantive Due Process**

4 “The substantive component of the Due Process Clause ‘forbids the government
5 from depriving a person of life, liberty, or property in such a way that ‘shocks the
6 conscience’ or ‘interferes with rights implicit in the concept of ordered liberty.’” *Dunn v.*
7 *Reynolds Sch. Dist. No. 7*, No. CV-09-1259-HU, 2010 WL 4718781, at *11 (D. Or. Nov.
8 15, 2010) (citing *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998)). The
9 Ninth Circuit has “held that a plaintiff can make out a substantive due process claim if
10 she is unable to pursue an occupation and this inability is caused by government actions
11 that were arbitrary and lacking a rational basis.” *Engquist v. Oregon Dep’t of Agric.*, 478
12 F.3d 985, 997 (9th Cir. 2007) *aff’d* 553 U.S. 591 (2008). This claim is available only in
13 “extreme cases.” *Id.* Such circumstances include “a government blacklist, which when
14 circulated or otherwise publicized to prospective employers effectively excludes the
15 blacklisted individual from his occupation, much as if the government had yanked the
16 license of an individual in an occupation that requires licensure.” *Id.* (quoting *Olivieri v.*
17 *Rodriguez*, 122 F.3d 406, 408 (7th Cir. 1997)). In order to state a claim, Ames must
18 present evidence of “government employer actions that foreclose access to a particular
19 profession to the same degree as government regulation.” *Id.* at 998.

20 To support a claim, a plaintiff must show “that the character and circumstances of
21 a public employer’s stigmatizing conduct or statements are such as to have destroyed an
22 employee’s freedom to take advantage of other employment opportunities.” *Id.* (quoting

1 *Bordelon v. Chi. Sch. Reform Bd. of Trs.*, 233 F.3d 524, 531 (7th Cir. 2000)) (internal
2 quotation marks omitted). “It is not enough that the employer’s stigmatizing conduct has
3 some adverse effect on the employee’s job prospects; instead, the employee must show
4 that the stigmatizing actions make it virtually impossible for the employee to find new
5 employment in his chosen field.” *Id.*

6 In this case, Ames provides seven paragraphs of allegations supporting his
7 substantive due process claim. FAC ¶¶ 6.74–6.84. First, Ames alleges as follows:

8 Defendant Mark Lindquist and his office destroyed Det. Ames [sic]
9 career and Pierce County’s top computer forensic examiner. Defendants
10 violated his substantive due process rights because it is inherently unfair to
11 generate false information about a civil servant without providing him any
12 opportunity to clear his good name. Defendants have violated his
13 substantive due process rights by failing to conduct an independent
14 investigation into his whistleblower complaint and his whistleblower
15 retaliation complaint. Defendants have violated basic principles of fairness
16 by using an unfounded whistleblower complaint as potential impeachment
17 evidence simply because it was a complaint against the prosecutor’s office.
18 This creates an inherently unfair and disparate impact on law enforcement
19 officers who then have no ability to blow the whistle on prosecutorial
20 misconduct without forfeiting their career due to the inherent risk that the
21 complaint will not be independently investigated and will necessarily be
22 ruled unfounded and later disseminated as “Brady” material against the
officer. Defendants have violated Mike Ames [sic] substantive due process
rights by using Mark Lindquist’s personal attorney to discredit Mike Ames.
Defendants have violated Mike Ames [sic] substantive due process rights
by failing to hold Mark Lindquist accountable for the acts of misconduct
identified in the Busto whistleblower investigation report specific to Ames.

Id. ¶ 6.74. This paragraph is filled with vague, conclusory, and irrelevant allegations.

19 For example, Ames alleges that Defendants have violated his due process “rights by
20 failing to hold Mark Lindquist accountable for the acts of misconduct” in a whistleblower
21 complaint. *Id.* Ames, however, fails to explain how his rights are violated because
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1 another government official has not been held accountable. Ames is essentially asserting
2 that failure to punish Lindquist is conscience-shocking conduct that prevents Ames from
3 pursuing his chosen profession. Such an allegation is simply not in accordance with any
4 relevant authority. Therefore, the Court grants Defendants' motion as to the allegations
5 in this paragraph.

6 Second, Ames alleges that "Mark Lindquist's retaliatory actions described above
7 under Mike Ames [sic] First Amendment claim are incorporated into his substantive due
8 process claims in this section." *Id.* ¶ 6.75. This conclusory allegation violates the rules
9 of pleading because it fails to put either the Court or Defendants on notice of what
10 "retaliatory actions" form the basis for a substantive due process claim. Therefore, the
11 Court grants Defendants' motion on this paragraph.

12 Third, Ames asserts three paragraphs of allegations regarding the manufacturing
13 of evidence. Specifically, Ames alleges as follows:

14 Defendants have manufactured and created their own pre-textual
15 "Brady" materials against Mike Ames using their own false statements of
dishonesty and an unfounded whistleblower investigation that was not
prepared in an unbiased and a non-prejudicial manner.

16 Mark Lindquist and his office have filed dishonest declarations with
the court.

17 Mark Lindquist has [sic] his office have published negative and false
statements about Ames in the press.

18 *Id.* ¶¶ 6.76–.78. While these are the strongest allegations to support actions that could
19 shock the conscience, the allegations are not correlated with allegations that Ames is
20 virtually excluded from his profession. *See Engquist*, 478 F.3d at 998 ("substantive due
21 process protects the right to pursue an entire profession, and not the right to pursue a
22

1 particular job.”). Moreover, without identifying the particular false statements or
2 declarations, Defendants and the Court are unable to evaluate whether Defendants are
3 entitled to relevant immunities. Therefore, the Court grants Defendants’ motion to
4 dismiss these paragraphs.

5 Fourth, Ames asserts irrelevant allegations regarding the treatment of others.
6 These allegations are as follows:

7 Defendants have not treated others who are supportive of Mark
8 Lindquist and who have not spoken out against Mark Lindquist or
otherwise sought redress from the misconduct of his office in the retaliatory
manner defendants have treated Mike Ames.

9 Defendants have treated others like Glenda Nissen who is also a
10 whistleblower against Mark Lindquist and his office in the same retaliatory
manner as they have treated Mike Ames.

11 FAC ¶¶ 6.79–.80. Ames fails to show how the treatment of others supports his
12 substantive due process claim. Therefore, the Court grants Defendants’ motion to
13 dismiss these paragraphs.

14 Fifth, Ames alleges that Defendants have “constructively discharged [him] without
15 cause” FAC ¶ 6.81. Constructive discharge, however, is not the standard for a
16 substantive due process claim. *See Engquist*, 478 F.3d at 998. Therefore, the Court
17 grants Defendants’ motion to dismiss Ames’s substantive due process claim because he
18 has failed to assert sufficient factual allegations to support an entitlement to relief.

19 In the event the court finds that dismissal is warranted, the court should grant the
20 plaintiff leave to amend unless amendment would be futile. *Eminence Capital*, 316 F.3d
21 at 1052. Ames has asserted on several occasions that he was constructively discharged.
22 To establish constructive discharge in the Ninth Circuit, a plaintiff must demonstrate that

1 “a reasonable person in his position would have felt that he was forced to quit because of
2 intolerable and discriminatory working conditions.” *Huskey v. City of San Jose*, 204 F.3d
3 893, 900 (9th Cir. 2000) (citation omitted). The Court is skeptical that such
4 circumstances would result in an “extreme case” of stigmatization and rise to the level of
5 a substantive due process claim, which requires a complete foreclosure to a particular
6 profession. *See Engquist*, 478 F.3d at 998. The Court has reviewed the complaint,
7 Ames’s briefs, and his letter of resignation, and Ames fails to assert allegations that he is
8 forever precluded from pursuing a profession in law enforcement. In fact, in his letter of
9 resignation, he stated that, due to the unjust *Brady* label, his “law enforcement reputation
10 and career continue to be damaged.” Dkt. 24-1 at 9. Yet, damaged career prospects does
11 not amount to an “extreme case” wherein Ames’s freedom to pursue a profession is
12 “destroyed.” *Engquist*, 478 F.3d at 998. In fact, if Ames’s career was destroyed, his
13 termination would have been via actual termination instead of a constructive discharge.
14 The Court, however, is unable to conclude that at this time any amendment would be
15 futile. Therefore, the Court grants Defendants’ motion to dismiss Ames’s substantive due
16 process claim without prejudice and grants Ames leave to amend.

17 **C. Remaining Issues**

18 Due to Ames’s voluminous filings, the Court has separated consideration of the
19 issues in this matter. Having issued orders on the federal issues, the Court will consider
20 the state law claims. Ames may file a supplemental response no later than May 12, 2017,
21 Defendants may file a supplemental reply no later than May 19, 2017, and the Clerk shall
22

1 renote Defendants' motion to dismiss for consideration on the Court's May 19, 2017
2 calendar.

3 **III. ORDER**

4 Therefore, it is hereby **ORDERED** that Plaintiffs' motion for reconsideration
5 (Dkt. 37) is **DENIED**, Defendants' motion to dismiss (Dkt. 26) is **GRANTED in part**
6 **without prejudice** as to Ames's due process claims, and Ames is **GRANTED leave to**
7 **amend** these claims.

8 The parties may file supplemental briefing as set forth herein, and the Clerk shall
9 renote Defendants' motion.

10 Dated this 26th day of April, 2017.

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13 BENJAMIN H. SETTLE
14 United States District Judge
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